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No. 89-901

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

W.R. GRACE & CO. – CONN.,

Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA and THE STATE TAX APPEAL BOARD OF THE STATE OF MONTANA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

REPLY BRIEF OF PETITIONER

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INTRODUCTION

In its petition, Grace contends that the Montana State Tax Appeal Board's ("STAB's") standard practice of relying on secret *ex parte* submissions of the Montana Department of Revenue (the "Department"), without providing opposing counsel with notice or an opportunity to respond, raises substantial due process issues that warrant review by this Court.

Far from presenting a "unique" question, as respondents gratuitously suggest (Resp. Br. at 2),[1] this case presents a question

[1] Brief in Opposition to Petition for Certiorari will be herein referenced as "Resp. Br.," the Petition for Certiorari will be herein referenced as "Pet. Br."

(Footnote continued)

of profound national significance. In addition to its direct effect on the thousands of taxpayers subject to taxation in Montana, many of which conduct their affairs on a national basis, this case seriously implicates the proper conduct of every adversary proceeding in the United States. If secret *ex parte* communications between a litigant and a tribunal are acceptable in an adjudication before a Montana state tax court, then they are acceptable in courts and administrative tribunals throughout the land. Indeed, the national importance of this case is underscored by the filing of a brief *amicus curiae* by the Committee on State Taxation of the Council of State Chambers of Commerce, which represents 43 state chambers of commerce across the nation.

In its opposition to Grace's petition, the Department follows the same tack it used in Montana to defend STAB's standard practice: take whatever steps and whatever positions are necessary to elude scrutiny. To this end, the Department does not seriously attempt to address the merits of Grace's claim. Instead, it raises a smoke screen of arguments intended to obscure STAB's pernicious practice of performing its judicial duties with the assistance of secret *ex parte* communications.

As is demonstrated below, none of Respondent's objections should dissuade this Court from considering the substantial federal question that Grace has properly raised.

ARGUMENT

I. *This Court Has Jurisdiction To Hear This Case.*

The Department has taken the position that this Court does not have jurisdiction to hear this petition. Resp. Br. at 1, 8, 9-10. The Department contends that the Montana Supreme Court did not rule on the constitutional issue raised in this petition because it was allegedly not raised in a timely manner. Resp. Br. at 8.

There is no substance to the Department's argument. The Montana Supreme Court did rule on the constitutional issue raised in this petition. Grace's petition for rehearing was timely filed. The Department is in full agreement with this fact. Resp. Br.

References to Appendix to the Petition will be referenced herein as "Pet. App.", references to the Appendix to the Brief in Opposition will be herein referenced as "Resp. App."

at 1. Grace's amended petition for rehearing, filed while its petition for rehearing was pending with the court, supplemented and related directly to its timely filed petition for rehearing. As a result, the amended petition was, under Montana law, itself timely filed.

Indeed, the Department has affirmatively expressed its belief that Grace's amended petition for rehearing was timely filed. In *PacifiCorp v. Department of Revenue*, Cause No. CDV-89-344 (Montana First Judicial District, Lewis and Clark County) the Department cited the Montana Supreme Court's denial of Grace's amended petition for rehearing as substantive support for its position in that case that STAB's standard practice was lawful. Resp. App. C at 13a. Hence, the Department believes that Grace's amended petition was denied on the merits – not on the ground that it was untimely filed – otherwise the Department could not have cited the case for the proposition that STAB's standard practice was lawful.[2]

II. *The Essential Facts Underlying Petitioner's Claim Are Undisputed.*

The Department alleges that the facts upon which Grace bases its case are incomplete and inaccurate. Resp. Br. at 2-3, 8. The Department then claims that this Court will be forced to become a fact finder in this case. Resp. Br. at 8. Contrary to the Department's statements, no factual dispute surrounds the essential facts upon which Grace's case is founded.

The Department does not dispute – and there can be no dispute over – the improper nature of STAB's "standard practice." STAB's standard practice is discussed at length in Grace's petition. The petition states:

> Paul Van Tricht, Tax Counsel for the Department of Revenue and counsel for the Department in this case, testified in a deposition that he had been requested by STAB to prepare opinions in contested cases (App. I at 88a-90a),

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[2] The Montana district court in *PacifiCorp* expressed some uncertainty as to whether the Montana Supreme Court's denial of Grace's amended petition for rehearing was a decision on the merits. The Montana court's uncertainty was attributable entirely to its mistaken belief that Grace's petition for rehearing – not the amended petition for rehearing – was not timely filed. Resp. App. C at 13a. Since the petition for rehearing was filed in a timely manner, the Montana District Court's uncertainty was unwarranted.

> including the instant case (App. I at 89a-90a); that this was STAB's "standard procedure" (App. I at 90a) and "standard practice" (Id.); and that he did not inform opposing counsel of the requests (App. I at 88a) or send copies of the opinions he drafted to opposing counsel (App. I at 91a).

Pet. Br. at 13 (footnote omitted).

The petition later states:

> STAB, *without notice to opposing counsel*, contacted the Department and requested it to draft the opinion in a contested case. The Department, *without notice to opposing counsel* and in accordance with STAB's "wish" (App. L at 113a) that opposing counsel not be notified, secretly complied with STAB's request. And STAB, *without notice to opposing counsel*, adopted the Department-drafted opinion.

Id. at 16 (emphasis in original).

The Department's only response to this discussion of STAB's standard practice is to claim that the practice was not a secret. Although the secret nature of the standard practice made it that much more offensive, whether the *ex parte* communications between STAB and the Department were, in fact, secret is an issue that this Court need not address. The problems which may result from the standard practice – STAB's abdication of its adjudicative role, overreaching and exaggeration by the Department, and STAB's loss of independence from the Department – are not related to the fact that the practice was secret.

Indeed, this Court need not reach any of the issues that form the basis of the Department's claim that the factual information included in the petition is incomplete and inaccurate. None of the issues that the Department seeks to quibble about is essential to Grace's due process claim. Grace's petition rests on the uncontested facts that (1) *ex parte* communications took place between STAB and the Department in the course of an adversary proceeding and (2) Grace was denied an opportunity to participate in or respond to these communications.

In the interest of completeness, however, Grace will nevertheless address the two factual issues that the Department believes this Court must resolve.

1. The Department first claims that Grace or its attorneys knew of STAB's standard practice at the time of its November 1986 STAB hearing. Resp. Br. at 3-4. Contrary to the recollections and suggestions of Mr. Van Tricht, neither Grace nor its attorneys were aware of the standard practice until shortly before the filing of Grace's amended petition for rehearing. Grace's attorney George T. Bennett, even after being contacted by Mary Hempleman, the dissenting STAB member mentioned in the Department's brief at pages 5-6, was not aware of the standard practice as it is set out in Petitioner's brief.

Grace's attorney Terry B. Cosgrove similarly was not aware that the standard practice was used in Grace's case even though he did attend the PacifiCorp deposition cited in the Department's brief. Mr. Cosgrove did not make the connection between the standard practice used in the PacifiCorp case and the fact that the standard practice was also used in Grace's case until immediately before Grace filed its amended petition for rehearing in the Montana Supreme Court. Therefore, the Department's allegation that Grace and its attorneys were aware of the secret *ex parte* draft of the opinion prior to the filing of Grace's amended petition for rehearing is totally false.

The Department further argues that Grace and its attorneys should have been aware of STAB's standard practice after the Montana District Court's decision in *Helmmco, Inc. v. Department of Revenue*, Cause No. 5082 (Montana First Judicial District, Lewis and Clark County). Resp. Br. at 4. The Department also claims, without support, that the practice was announced after hearings. Id.

This argument is particularly astonishing given that Grace's failure to learn of the standard practice is directly attributable to the steps taken by STAB and the Department to conceal the standard practice from taxpayers like Grace. The Department conveniently forgets the extraordinary actions taken by the Department and STAB after the *Helmmco* decision to ensure that later taxpayers, including Grace, did not learn of STAB's standard practice. These steps included discontinuing the use of transmittal letters previously sent along with opinions drafted by the Department so that opposing counsel would not become aware of STAB's standard practice. Pet. Br. at 9. Whatever hints

might have been available to taxpayers before the *Helmmco* decision were certainly eliminated after that decision.

2. The Department claims that (A) its secret *ex parte* communication did not have a prejudicial effect on the outcome of Grace's case (Resp. Br. at 4-5); (B) Grace had full and fair opportunity to present its entire case and all its arguments to STAB (Id.); (C) STAB reached a decision in this case before the secret *ex parte* communication with the Department (Id. at 4.); and (D) STAB ruled for and against the Department (Id. at 5.). From this last claim, the Department somehow surmises that STAB carefully considered the evidence presented in the case in reaching its ruling. Id.

The Department's statements fail to establish that the Department's secret *ex parte* communications with STAB did not alter the outcome of this case. More importantly, the statements do not establish that the outcome of this case would not have been changed if Grace had been permitted to respond to the Department's secret *ex parte* communications. The Department fails even to address these questions.

Had Grace been accorded an opportunity to respond to the Department's proposed findings and conclusions before they were frozen into STAB's opinion, Grace would have strenuously objected to those findings and conclusions. Pet. Br. at 17. Grace's objections would have required STAB to deal with the difficult issues raised by the case, and perhaps to settle on a position that was less one-sided than the Department-drafted opinion.

Furthermore, whether Grace can establish actual prejudice in this case is irrelevant. Even if the prejudice were less clear, this case would be no less deserving of consideration by this Court. Pet. Br. at 17. For the vice of *ex parte* communications like those at issue here is that they inevitably carry with them a substantial risk of prejudice, the precise impact of which may be unknown or unknowable. See *In re Wisconsin Steel Co.*, 48 Bankr. 753, 760 (N.D. Ill. 1985) cited at Pet. Br. at 17-18.

III. *The Montana Supreme Court's Decision In This Case Settled Montana Law With Respect To STAB'S Standard Practice.*

The Department argues that the validity of STAB's standard practice will "probably" be settled by the Montana courts on

independent state grounds. Resp. Br. at 9, 10-11. Contrary to the implicit assumption in this argument, the highest judicial body in Montana has already settled the validity of STAB's standard practice under state law. The Department evidenced its understanding of this fact when it cited the Montana Supreme Court's denial of Grace's amended petition for rehearing as substantive support for its position in *PacifiCorp* that STAB's standard practice was valid under state and federal law. Resp. App. C at 13a.

Since this issue has already been resolved on state law grounds, the Department apparently believes that if the Montana Supreme Court is given an opportunity to reconsider this question, the court will reverse itself and find that the practice is illegal under Montana law. This baseless speculation must be rejected. The Department, which would certainly be aware of any case in which this issue might be raised, does not cite a single case either before the Montana Supreme Court or before the Montana District Court that will allow the Montana Supreme Court to reconsider the validity of STAB's standard practice under state law. The Department's statement in its brief that "[a]s shown in Grace's Appendix this issue has been raised in several other cases currently pending in Montana courts" is incorrect. Resp. Br. at 10. None of the cases mentioned in Grace's appendix is currently pending in the Montana courts.

IV. *The Department's Secret Ex Parte Communication Affected The Outcome Of This Case.*

The Department adopts the position in its brief that the secret *ex parte* communication could not affect the Montana Supreme Court's resolution of this case. Resp. Br. at 9, 11. This argument concerning the prejudicial effect of the Department's secret *ex parte* communication should be rejected.

Any prejudice which resulted from the secret *ex parte* communication affected the outcome of Grace's case. The Montana Supreme Court must uphold all legal interpretations of STAB which do not reach an extraordinary level of misguidedness. Under the standard of review applied in this case, the Montana Supreme Court may overturn STAB's interpretation of a statute only in cases where the interpretation is " 'clearly contrary to the legislative intent behind the statute[s]' ". Pet. Br. at 7 (citation omitted).

The extraordinary deference accorded to STAB under this standard is evidenced by the Montana Supreme Court's statement that " 'it is not a judicial function to act as an authority on taxation matters.' " Id. at 7 (citation omitted). Until its convenient change of position on this issue, the Department fully agreed with Grace that the Montana courts do not interfere with STAB's interpretation of the state's tax law except in the most egregious cases. Pet. App. J at 92a-95a.

The wide latitude of error allowed by the abuse of discretion standard virtually ensures that a prejudicial *ex parte* communication which includes Department-drafted findings reflecting the Department's position on factual issues will affect the final outcome of a taxpayer's case. A reviewing court may remove the effect of a prejudicial *ex parte* communication only in those exceptional cases where it is permitted to correct a legal error. The fact that the abuse of discretion standard does allow the Montana Supreme Court to overrule STAB on occasion does not mitigate the fact that in most cases STAB's errors go uncorrected.

V. *STAB's Standard Practice Raises A Substantial Due Process Question.*

The Department seeks to belittle the significance of the due process issue this case raises by misconceiving it. This case does not present the simple question of whether it is constitutionally acceptable for courts to adopt as their own the findings and conclusions prepared by one litigant. Although many reviewing courts — including this one — have condemned that practice, it is true that they have nevertheless refused on occasion to disturb the trial court's judgment when it was supported by substantial evidence. *See, e.g., Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964). The Department relies on these cases as support for STAB's practice in this case. Resp. Br. at 12-13. The only proposition those cases support — a proposition for which Grace cited them in its Petition (Pet. Br. at 15-16) — is that courts have uniformly disapproved of the practice of adopting one litigant's submissions, even when opposing counsel has been notified and provided with an opportunity to respond to them.

This case, however, involves a far more serious abuse of the judicial process — an abuse that clearly raises a substantial due

process question. For in this case, the conclusions and findings of one party were secretly submitted *ex parte* to the adjudicative body and opposing counsel was provided with no opportunity to respond to them.

Although the Department relies on three cases (in addition to those cited above), *Aiken County v. BSP Div. of Envirotech Corp.*, 866 F.2d 661 (4th Cir. 1989), *Bradley v. Maryland Casualty Co.*, 382 F.2d 415 (8th Cir. 1967), *In re Colony Square Co.*, 819 F.2d 272 (11th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988), in support of its position that STAB's practice does not raise significant due process concerns, none of these cases supports the Department's position. In *Aiken County*, a trial court decision was attacked on the ground that the court's "near-verbatim" adoption of one party's proposed findings of fact and conclusions of law deprived the adverse party of due process of law. *Id.* at 677. The circuit court rejected this argument stating that although the procedures employed by the trial court in adopting findings and conclusions were not ideal, they were adequate to protect the parties' rights.

The circuit court's decision in *Aiken County* is understandable given the procedures employed by the trial court. These procedures deterred the types of abuses that the prohibitions against *ex parte* communications are intended to prevent. The trial court in *Aiken County* announced its general impressions on the central issue in the case to the parties at the trial. The court called for and the parties filed findings and conclusions. Since these documents were filed with the court, they were available in the record for the parties to review prior to the issuance of a final decision. If one party had overreached or exaggerated in its findings and conclusions, an opposing party could have notified the court by letter.

To Grace's extreme detriment, STAB did not employ any similar safeguards to protect Grace's rights. Unlike the trial court in *Aiken County*, STAB asked only the Department to prepare findings and conclusions, and Grace was not aware of, and not permitted to respond to, the Department's findings and conclusions.

In *Bradley*, the trial court called for and relied upon findings and conclusions that were prepared by one party to the proceeding.

382 F.2d at 422. The court found no violation of any constitutional rights in that case. *Id.* at 423. Given the court's statement that "[t]he present record . . . is unclear as to just what did happen here and we are left with no more than thin inferences," no support for the Department's position can be drawn from this opinion. *Id.* The Department candidly admits that it is unsure whether one party prepared findings and conclusions without notice to opposing counsel. Resp. Br. at 13.

In *Colony Square*, a bankruptcy court judge also called for and relied upon findings and conclusions prepared by one party to the proceedings. The Circuit Court of Appeals concluded that Appellant Colony Square was not denied due process. 819 F.2d at 276. *Colony Square* is clearly distinguishable from this case. In *Colony Square*, the district court applied its own independent consideration and analysis when it examined the tainted orders. *Id.* at 277. This independent consideration and analysis served "to correct any errors in the proceedings used by the bankrupcty judge." *Id.* In this case by contrast, the reviewing courts accorded STAB's findings and conclusions the utmost deference. The Montana courts did not act to remove the prejudicial effects of STAB's standard practice. *See* pp. 7-8 *supra*.

In short, there is no judicial support for the Department's extraordinary contention that the Due Process Clause tolerates the preparation of opinions in adversary proceedings based on the *ex parte* submissions by one party to an adversary proceeding without providing the opposing party with an opportunity to respond. STAB's "standard practice" plainly raises a substantial due process issue that this Court should resolve.

CONCLUSION

The petition for a writ of certiorari to review the judgment of the Montana Supreme Court should be granted.

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